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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALI ACHEKZAI, Defendant and Appellant.	G046435 (Super. Ct. No. 04CF3110) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Daniel J. Didier, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to Cal. Const., art. VI, § 6.) Affirmed as modified.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Michael Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found defendant Ali Achekzai guilty of two counts of forcible rape in violation of Penal Code section 261, subdivision (a)(2) upon Jane Doe No. 1 and Jane Doe No. 2 as charged in counts one and three of the information, and that as to both counts, it was true defendant committed an enumerated offense against more than one victim within the meaning of Penal Code section 667.61, subdivision (e)(5). (Unless otherwise indicated, all statutory references are to the Penal Code.) He was also found guilty of two counts of sexual penetration by foreign object upon Jane Doe No. 1 and Jane Doe No. 2 as charged in counts two and four, and the jury again returned a true finding under section 667.61, subdivision (e)(5). As to counts three and four, the jury further found it to be true defendant inflicted great bodily injury on the victims within the meaning of sections 12022.8 and 667.61, subdivision (e)(3). The jury further found defendant guilty of aggravated assault of Jane Doe No. 2 as charged in count five and that he personally inflicted great bodily harm within the meaning of section 12022.7. Lastly, the jury found defendant guilty of assault with intent to commit sexual assault upon Jane Doe No. 3 as charged in count six. The court sentenced defendant to serve a determinate sentence of 21 years and an indeterminate sentence of 40 years to life in state prison.

Defendant contends he did not inflict great bodily injury on Jane Doe No. 2 *in the commission of* a sex offense, the trial court erred when it instructed the jury it could consider charged as well as uncharged crimes as propensity evidence, that the trial court erred when it ordered consecutive sentences on counts two and four as well as on the determinate and indeterminate sentences, and that the court improperly imposed punishment more than once for infliction of great bodily injury on Jane Doe No. 2. We agree the court improperly punished defendant twice for inflicting great bodily injury on Jane Doe No. 2 and strike that portion of the sentence. In all other respects, we affirm.

I

FACTS

Jane Doe No. 1

Jane Doe No. 1 was 21 years old in January 2004. The evening of January 30 began as a birthday celebration for a friend in a Newport Beach restaurant. The celebrants then proceeded to the Serra's Club in Laguna Beach. At the club, she met "this guy named Monier" and she danced with him the whole night. Because she was driving, Jane Doe No. 1 did not drink any alcohol.

When the club closed at 2:00 a.m., Monier said he lost his ride and asked for a lift, which Jane Doe No. 1 agreed to do "because he lived on my way home." She dropped him off at an apartment in Irvine, and declined his invitation to go inside his apartment.

Jane Doe No. 1 described what happened next: "His friend, who also was introduced at the club to me, pulled up right behind us." "His name is Ali. We call him Zeus because he has — he's strong and he's got big hands. That's the only introduction I got. Then right when I dropped him off he pulled up right behind us." In court, she identified defendant as the person she was introduced to as Ali or Zeus.

Jane Doe No. 1 said goodbye and left the apartment complex to drive home. She said: "I was driving, and I noticed the silver BMW that Ali was driving in was following me. I noticed no matter which turn I would take I'm being followed. So I tried losing him a couple times to make sure that I'm not being followed, and then realized that I am being followed. [¶] And I took Jamboree Road towards — I was going home towards the 5 freeway. He pulled up next to me on the road, and I slowed down to see what he wants. He said to roll down the window. He said, 'You don't know what you just got yourself into.'" When she asked him what he was talking about, defendant said: "I can't be telling you this on the freeway. Why don't you exit so we can talk." She exited and pulled into a Jack in the Box parking lot. It was about 4:00 a.m.

With the two cars parked side by side, Jane Doe No. 1 got into the front seat of defendant's car. He told her Monier was in a gang and that she was in big trouble because Monier would track her down and hurt her. They talked for 20 or 25 minutes. Jane Doe No. 1 was scared and shaking and said she just wanted to go home.

Defendant reached over to her right shoulder and pulled her toward him and told her to give him a kiss. She said she didn't want to give him a kiss and wanted to go "and he wouldn't let me go." They struggled, but she managed to get out of her car and was going towards her own car. He followed and they struggled again. She managed to open her car door, and defendant grabbed her cell phone and car keys.

At some point, defendant got into the passenger seat of Jane Doe No. 1's car and she was in the driver's seat. She tried driving away to find a more public place and there was another struggle. Defendant took over the steering wheel and steered her car back into the parking lot.

Defendant put his seat into the recline position and asked her to do the same. She refused, got out of her car and started running. Defendant chased her down and brought her back to her car, but this time to the passenger seat. He grabbed her by the neck and told her to "shut the f. . . up, bitch." She said defendant, "Then started cussing me and got very physical and violent and pulled my pants down and pulled my panties down and used his fingers." When the prosecutor asked if that meant defendant put his fingers inside her vagina, she responded "Yes." She said he became violent and choked her.

Jane Doe No. 1 said defendant removed his pants and was trying to get his penis inside of her, but was frustrated because "he could not get erect" and "was masturbating." She felt him "slightly" inside her vagina. After masturbating and rubbing himself against her legs, he ejaculated. Afterward, her body was covered with bruises and scratches.

Jane Doe No. 2

Jane Doe No. 2 was 21 years old and living with her parents in San Diego County in 2004. At around 2:00 a.m. in May 2004, she and her parents, grandmother and a family friend returned from a visit to Arizona. She spoke with her cousin, M., on the phone and M. asked her to meet with her and two males at a shopping center. They met around 2:30 a.m. The men's names were Omar and Ali. Ali was later identified as defendant. They drove to Mt. Soledad.

They parked the car and talked for 20 or 25 minutes. "Ali said that we should go for a walk, so we went for a walk around the corner." They walked along a path until Jane Doe No. 2 said they should turn back and defendant grabbed her by the wrist and she started screaming. He put his hand over her mouth and she bit it, tasting blood. She said there was a struggle and "I got drug to the ground. We were struggling on the ground, and he was punching me in my face because I was trying to scream and he told me to shut up. He told me he was going to kill me if I didn't shut up. So he had his arms on my — on my arms and his legs, and I was pushing my pelvis up when he was trying to push himself on top of me." They struggled for five minutes. Jane Doe No. 2 described what happened next: "He was trying to pull my pants off, and I was trying to fight him off, but he pulled my pants off with my underpants stuck to it. And I was trying to thrust my pelvis up. He's a lot bigger than me, so he was pushing me down and I was trying to scream, but, like I said, I felt like I couldn't scream as loud as I possibly could, and kept hitting me." He was hitting me "in my face and my body trying to hold me down at the same time because I was struggling." He unbuckled his pants "and he was trying to force himself on top of me. We were just struggling back and forth, and my body just hurt because of the pain, like, physical pain that I had endured, so — and he kept on telling me, 'I'm going to kill you. I'm going to kill you.' So he had sex with me, and he was done and he put his pants back on."

The following questions were asked by the prosecutor and answered by Jane Doe No. 2:

"Q: Now, when you say he had sex with you, are you talking about his penis going inside your vagina?

"A: Yes.

"Q: Before that happened, did he touch you or violate you in any other way before his penis went inside your vagina?

"A: Yes, his fingers.

"Q: Can you describe how that happened?

"A: My pants were off, so I was trying to shake him off and he kept on sticking his fingers inside me."

After he ejaculated on the outside of her vagina, he buckled up and she got dressed. Defendant said: "Don't say anything." After she refreshed her recollection by reading a document shown to her by the prosecutor, Jane Doe No. 2 said defendant had to masturbate himself in order to maintain an erection.

Jane Doe No. 2 described what happened when they went back to the car: "My cousin was in the passenger seat, and I knelt down, and, obviously, she looked at me because my hair was a mess and pulled out and my clothes were dirty and ripped from the ground and the dirt, and I told her that he raped me." M. said she was going to call the police, and Jane Doe No. 2 described what defendant said in response: '"Don't. We don't have — I have a felony' or 'I don't have papers' or something of that sort."

M. is the first cousin of Jane Doe No. 2. She testified that when Jane Doe No. 2 returned to the car, she was shaking and crying. She had twigs in her hair and looked disheveled. She said she had been raped. M. took out her phone to call the police, and "Omar grabbed the phone from my hands and told me that he was here illegally, and if I called the police he would get in trouble." "At that point, Ali had walked up and was claiming that my cousin was lying."

Eventually everyone got back into the car because "the only way we were able to get back was if Omar gave us a ride to my car and [M.'s] car." Jane Doe No. 2 described what happened during the drive. Defendant accused her of not telling the truth. She added: "My cousin was yelling and screaming and cussing. And I just — all of a sudden something just snapped, and I started cussing at Ali and hitting him from the back seat and cussing and yelling and he turned around." Defendant then "turned around and close fisted he punched me in my face and knocked my front tooth out."

A dentist testified Jane Doe No. 2 she came into him with her front tooth knocked out. He said: "The entire tooth was out, and, you know, she must have had like a hard knock to the tooth and she was — she had the tooth in her hand when she came in."

Jane Doe No. 3

On October 26, 2002, Jane Doe No. 3 was 22 or 23 years old and was in the parking lot of Serra's Club in Laguna Beach with defendant. Jane Doe No. 3 was "tipsy." Six people, four males and two females, including Jane Doe No. 3 got into a stretch limo. They were drinking. The other female, Sophia, was passed out. One male got out.

Jane Doe No. 3 described what happened next: "As soon as the gentleman got out of the car and it was three of them — because it was four of them to begin with, and then it was three of them, things started getting ugly." She said: "All I remember is my breasts were getting fondled with, and I told him, the gentleman, to get off of me, the defendant." Defendant had gotten on top of her.

Then she realized the zipper on her pants was down and her shirt was being unbuttoned. She also looked over at the unconscious Sophia and saw another male had his pants down and "he was injecting his penis into her vagina." When asked what Sophia was doing, Jane Doe No. 3 said: "Sophia wasn't doing anything. She didn't

know what was going on." Jane Doe No 3 said: "She was still passed out and that's why I was crying and screaming, 'get off my friend.'" She screamed at defendant to get off of her and bit the other male's cheek. She explained: "I don't think I bit the defendant's cheek. I bit his friend's cheek because they both tried to get at me because they both attacked my friend." At some point, a friend of Jane Doe No. 3 opened the door of the limousine from the outside and helped her out.

He heard a female screaming from inside the limousine. As the door opened, he saw "defendant on Jane Doe," and Jane Doe No. 3 was "basically kicking." Another man was having sexual intercourse with Sophia who was passed out. When the door opened, Jane Doe No. 3 "came out of the limousine. She was crying. She said, 'Help my friend, please.' [¶] And I tried to get Sophia out of the car, and she came out of the car with her — with her underwear [down]." Jane Doe No. 3 also said: "I just got sexually assaulted. Help us. Sophia just got raped."

II

DISCUSSION

Great Bodily Injury of Jane Doe No. 2

Defendant argues the great bodily injury finding must be reversed. His argument is there was insufficient evidence to support the jury's finding he inflicted great bodily injury on Jane Doe No. 2 *in the commission of* a sex offense because the sex offenses had ended by the time he struck her.

The Attorney General responds that, because defendant had not reached a place of temporary safety at the time he inflicted the injury, the great bodily injury was inflicted in the commission of sex offenses. The Attorney General further argues: "Sufficient evidence supports the jury's finding that [defendant] inflicted great bodily injury on Doe Two 'in the commission of' his sex offenses against her. At the time [defendant] struck Doe Two in the face, he had not reached a temporary place of safety. [Defendant] had not 'escaped from the scene'; indeed, he was in a car driven by someone

else, Doe Two was still in the car and Doe Two's cousin was barraging him with accusations of rape and threatened to call the police."

"Any person who inflicts great bodily injury, as defined in Section 12022.7, on any victim in a violation or attempted violation of paragraph (2), (3), or (6) of subdivision (a) of Section 261 . . . shall receive a five-year enhancement for each such violation in addition to the sentence provided for the felony conviction." (Former § 12022.8; Stats. 1997, ch. 109, § 2, pp. 476-477.) "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years." (Former § 12022.7; Stats. 2002, ch. 126, § 6, p. 554.) "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] . . . [¶] Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (§ 261, subd. (a)(2).)

The phrase "in the commission of" has been broadly construed in crimes involving felony murder and rape. (*People v. Castro* (1994) 27 Cal.App.4th 578, 586.) Accordingly, it makes little sense to narrowly construe a great bodily injury enhancement that attaches to those crimes.

While *People v. Jones* (2001) 25 Cal.4th 98, addressed different statutes, it is helpful here by analogy. In *Jones*, the Supreme Court granted review to address: "[C]an the use of a deadly weapon *after* the completion of a sex offense constitute its use 'in the commission of' the offense for purposes of Penal Code sections 12022.3, subdivision (a), and 667.61, subdivision (e)(4)?" (*Id.* at p. 100.) The *Jones* court answered the question in the affirmative: "if the offenses posed a greater threat of harm *because* the defendant used a deadly weapon to threaten or maintain control over his victim." (*Id.* at p. 101.)

In one case after a defendant committed a burglary, he took the victim with him when he fled. "When defendant departed from the victim's apartment the 'commission' of the burglary, for section 12022.7 purposes, had not ended. Defendant not only possessed property stolen during the burglary but still controlled the burglary victim. By removing her from the burglary situs defendant extended the need for section 12022.7's deterrent threat and thereby its effect. [¶] Therefore, in determining whether defendant inflicted 'significant or substantial physical injury' on the victim we consider injuries inflicted within and without her apartment . . . ." (*People v. Mixon* (1990) 225 Cal.App.3d 1471, 1488.)

'"The escape rule' defines the duration of the underlying felony, in the context of certain ancillary consequences of the felony [citation], by deeming the felony to continue until the felon has reached a place of temporary safety. [Citation.]" (*People v. Cavitt* (2004) 33 Cal.4th 187, 208.) "There is case support for the proposition that, under the escape rule, a felony continues as long as any one of the perpetrators retains control over the victim or is in flight from the crime scene. [Citations.]" (*Id.* at p. 209.) "Whether a defendant has reached a place of temporary safety is a question of fact for the jury. [Citation.] Case law does not specifically address whether this determination is to be based on the defendant's subjective belief or whether objective criteria are also relevant to this inquiry. However, we are satisfied that an objective standard is to be applied." (*People v. Johnson* (1992) 5 Cal.App.4th 552, 559-560.)

The situation here was that the victim and defendant, because they would have been stranded on top of a mountain in the middle of the night had they not gotten into the same car, were in the same car after the rape. The victim's cousin was threatening to call the police and shouting at defendant. Under these circumstances, defendant could not reach a place of temporary safety until he got to the bottom of the mountain and the evidence demonstrates he still had control over the victim since he was able to execute a punch hard enough to knock out her front tooth before the other two

occupants of the vehicle could stop him. We are satisfied there was no error in finding defendant inflicted great bodily injury on Jane Doe No. 2 in the commission of raping her.

Propensity Evidence

Defendant next argues the propensity evidence instruction given by the trial court violated his federal due process rights because it was premised on charged rather than uncharged offenses and was thus divorced from an Evidence Code section 352 analysis. The Attorney General responds that because the California Supreme Court recently rejected the argument that a trial court errs by instructing the jury on propensity evidence with respect to charged offenses, defendant's argument is unavailing.

The court instructed as follows: "The People presented evidence that the defendant committed the crimes of Forcible Rape, Sexual Penetration by Foreign Object by Force, and Assault with Intent to Commit a Sexual Offense. These crimes are defined for you in these instructions. [¶] If you decide that the defendant committed one or more of these offenses beyond a reasonable doubt, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit other charged offenses of Forcible Rape, Sexual Penetration by Foreign Object by Force, and/or Assault with Intent to Commit a Sexual Offense. [¶] If you conclude that the defendant committed one or more of these offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of other charged offenses of Forcible Rape, Sexual Penetration by Foreign Object by Force, and/or Assault with Intent to Commit a Sexual Offense. The People must still prove each charge and allegation beyond a reasonable doubt."

"Character evidence, sometimes described as evidence of a propensity or disposition to engage in a type of conduct, is generally inadmissible to prove a person's conduct on a specified occasion. [Citations.] This ban against admitting character evidence to prove conduct, however, does not prohibit admission of specific acts of misconduct to establish a material fact like intent, common design or plan, or identity [citation], and does not affect the admissibility of evidence regarding the credibility of a witness [citation]. [Citation.] The Legislature has also created specific exceptions to the rule against admitting character evidence in cases involving sexual offenses [citation], and domestic violence, elder or dependent abuse, or child abuse [citation]. [Citation.]" (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1159.)

As relevant here, Evidence Code section 1108, subdivision (a), provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.) "As the legislative history indicates, the Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes." (*Id.* at p. 915.)

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" (Evid. Code § 352.)

"[W]e conclude nothing in the language of section 1108 restricts its application to uncharged offenses. Indeed, the clear purpose of section 1108 is to permit the jury's consideration of evidence of a defendant's propensity to commit sexual offenses. 'The propensity to commit sexual offenses is not a common attribute among the general public. Therefore, evidence that a particular defendant has such a propensity is especially probative and should be considered by the trier of fact when determining the credibility of a victim's testimony.' [Citations.] '[C]ase law clearly shows that evidence that [a defendant] committed other sex offenses is at least circumstantially *relevant* to the issue of his disposition or propensity to commit these offenses.' [Citations.] In light of this clear purpose, we perceive no reason why the Legislature would exclude charged sexual offenses from section 1108's purview, and no indication that it did so in either the text of section 1108 or its legislative history. Whether an offense is charged or uncharged in the current prosecution does not affect in any way its relevance as propensity evidence. Indeed, section 1108's legislative history explains that '"admission *and consideration* of evidence of other sexual offenses to show character or disposition would be no longer treated as intrinsically prejudicial or impermissible."' [Citations.]" (*People v. Villatoro*, *supra*, 54 Cal.4th at p. 1164, fn. omitted.)

We recognize that defendant's opening brief was filed prior to the Supreme Court's decision in *Villatoro*. However, the respondent's brief cites the case, and defendant did not address it in his reply brief. We conclude the trial court properly instructed the jury regarding propensity evidence.

Consecutive Sentences

Defendant argues as follows: "Consecutive full-term sentencing was not required on counts 2 & 4 because those counts of conviction did not fall under the purview of former section 667.6, subdivision (d). Counts 2 & 4 were not committed on 'separate occasions' from counts 1 & 3. Thus, the trial court retained the discretion to

impose sentence on counts 2 & 4 under Penal Code section 667.6, subdivision (c) or under the Determinate Sentencing Law provisions of Penal Code section 1170.1. The mandatory consecutive full-term sentencing regime of former section 667.6, subdivision (d), upon which the trial court patently relied, did not apply in this case."

The Attorney General responds the trial court did not err because it was required to sentence consecutively.

Prior to sentencing, the court indicated its tentative sentence: "Court's tentative decision is this case is to deny probation. Sentenced for a period of indeterminate 40 years to life and a determinate sentence of 21 years. So I will—this will be all consecutive, of course." After hearing arguments from counsel and a statement from Jane Doe No. 2, the court stated: "With regard to sentencing, the court will consider the indeterminate sentence first pursuant to count one, which is the 261 [subd.] (a)(2). Court sentences 15 years to life and that is pursuant to Penal Code section 667.61,[subds.] (b), (e)(5) and inasmuch as there was more than one victim. [¶] Court also imposes an indeterminate term with regard to count three of 25 years to life. That's pursuant to Penal Code section 667.61, [subds.] (b), (e)(3), (5). Inasmuch as there was great bodily injury and more than one victim. [¶] . . . [¶] With regard to the determinate term, court selects count two as the base term, selects the midterm of six years. With regard to the other counts, the court must impose full, separate and consecutive sentences pursuant to Penal Code section 667.6, [subd.] (d). [¶] . . . [¶] So the total aggregate term for the determinate sentence is 21 years determinate. That is consecutive to the indeterminate term total 61 years."

Consecutive Sentences of Determinate Terms to Each Other

"A full, separate, and consecutive term shall be served for each violation of . . . paragraph (2) . . . of subdivision (a) of Section 261 . . . or . . . subdivision (a) of Section 289 . . . if the crimes involve separate victims . . . ." (Former § 667.6, subd. (d);

Stats. 2002, ch. 787, § 16, p. 3919.) Thus, since defendant's conviction of two counts of sexual penetration were for crimes committed on two different victims, the court was required to sentence consecutively. Nonetheless, defendant contends that because each rape and sexual penetration occurred on the same occasion, and because the trial court sentenced consecutively for each rape, it had the discretion to sentence concurrently on the two sexual penetration convictions. He prefers that the trial court had applied subdivision (c) of section 667.6, rather than subdivision (d). Subdivision (c) states: "In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term *may be* imposed for each violation of . . . paragraph (2) . . . of subdivision (a) of Section 261 . . . ." (Former § 667.6, subd. (d); Stats. 2002, ch. 787, § 16, p. 3919, italics added.) But defendant's argument here fails because "[w]here there are both determinate and indeterminate sentences, the provisions of the DSA [Determinate Sentencing Act], and more particularly section 1170.1, do not apply." (*People v. Mason* (2002) 96 Cal.App.4th 1, 15.)

"[W]hen one term is determinate and the other is indeterminate . . . each is calculated without reference to the other." (*People v. Reyes* (1989) 212 Cal.App.3d 852, 858.) Accordingly, the court was required to take the rape convictions, which involve indeterminate sentences, out of the equation when sentencing on the two sexual penetration charges, which involve determinate sentences. So, it is immaterial that each rape did occur on the same occasion as each respective sexual penetration.

The trial court did not err. It properly sentenced consecutively on counts two and four because they involved separate victims.

Consecutive Sentences of Determinate Terms to Indeterminate Terms

Regarding the indeterminate sentences being imposed consecutively to the determinate sentences, defendant points to no indication the trial court was unaware that it had discretion to sentence concurrently rather than consecutively. We do note the

prosecutor's sentencing brief informed the court of its discretion in this regard. Additionally, after the court announced its sentence, the prosecutor stated: "I believe the court is imposing the determinate term consecutive to the indeterminate term discretionary," and requested the court articulate its reasons. The prosecutor added: "My suggestions for reasons would be that aggravated nature, multiple victims, and the fact that these were separate sex acts on multiple victims and each punished separately and no 654 bar." The court stated: "Very well. The court will incorporate the comments of the prosecutor and those as its findings and imposing consecutive terms." "In the absence of any evidence to the contrary, we must presume the judge was aware of his discretion and chose not to exercise it. [Citation.]" (*In re Consiglio* (2005) 128 Cal.App.4th 511, 516.) We presume the court was aware of its discretion when it made its sentencing choices.

"Separate Occasions" Findings

According to defendant, remand is required because the trial court failed to make an oral pronouncement regarding a "separate occasions" finding to justify imposition of mandatory consecutive full-term sentences. Defendant contends it was incumbent upon the trial court to make an oral finding at sentencing that counts two and four occurred on separate occasions from counts one and three prior to imposing consecutive full-term sentences under section 667.6, subdivision (d). Because defendant did not raise this issue below, he forfeited this claim. (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 412.)

Use of Great Bodily Injury to Sentence on Counts Three, Four and Five

Defendant next contends that since his infliction of great bodily injury was used to impose "one-strike" sentencing on count three, the trial court was precluded from also imposing any other punishment that effectively relied on the same infliction of great

bodily injury, "namely the enhancements in counts 4 & 5." Citing section 667.61, subdivision (f), the Attorney General argues the trial court was not so precluded.

"An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision . . . ." (§ 654, subd. (a).)

"If only the minimum number of circumstances specified in [this statute] which are required for the [one-strike] punishment . . . have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the [one-strike] term . . . rather than being used to impose the punishment authorized under any other law . . . ." (Former § 667.61, subd. (f); Stats. 1998, ch. 936, § 9, p. 5430.)

Count Three

When the court sentenced defendant on count three, forcible rape of Jane Doe No. 2, it stated: "Court also imposes an indeterminate term with regard to count 3 of 25 years to life. That's pursuant to Penal Code section 667.61, [subds.] (b), (e)(3), (5). Inasmuch as there was great bodily injury and more than one victim."

Here the trial court imposed punishment for defendant inflicting great bodily injury on Jane Doe No. 2 by ordering defendant be imprisoned for 25 years to life, a term which was the longest among the choices available to the court. There was no error.

Count Four

In sentencing defendant on count four, sexual penetration by foreign object of Jane Doe No. 2, the court, pursuant to sections 12022.8 and 667.61, subdivision (e)(3), sentenced defendant to an additional term of five years.

Here the court imposed an additional five years punishment because defendant inflicted great bodily injury on Jane Doe No. 2. Since the court already imposed the longest punishment available for infliction of the great bodily injury, this

five-year punishment amounted to punishing defendant twice for the same act. This was error and we strike the imposition of five additional years on count four for the infliction of great bodily injury on Jane Doe No. 2.

Count Five

In sentencing defendant on count five, aggravated assault in violation of Jane Doe No. 2, the court stayed punishment on the section 12022.7, subdivision (a) enhancement.

Since the court did not impose additional punishment for the infliction of great bodily injury on Jane Doe No. 2, there was no error.

III

DISPOSITION

The judgment is modified in that we strike the imposition of five years for the enhancement on count four. The abstract of judgment is ordered to be corrected to reflect that punishment for the true finding of the enhancement for great bodily injury under sections 667.61, subdivision (e)(3) and 12022.8 is stayed. A copy of the amended abstract shall be forwarded forthwith to the Department of Corrections and Rehabilitation. As modified, in all other respects, the judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.